



Kenya

Submission to the Task Force on Citizenship and Related Provisions of the Constitution

Citizenship Rights in Africa Initiative

13 April 2011

A complete revision of the Citizenship Act

CRAI recommends that the task force undertake a complete revision to the Citizenship Act, rather than attempting amendments to the existing text. The Act currently only includes some limited additional provisions relating to acquisition of citizenship by registration, leaving the general qualifications for citizenship by birth and registration to the (1963) Constitution. The new version should set out the complete framework for citizenship, repeating the constitutional provisions where necessary. The drafting of a new act also provides the opportunity to improve on the provisions of the 2010 Constitution where it was not as comprehensive as it might have been.

We attach the summary of a study published by the Open Society Foundations of citizenship laws from all 53 African states in light of international human rights standards, which include comprehensive recommendations on the content of national citizenship laws, developed through a process of consultation with some of the main African and international experts on citizenship law.

Protection against statelessness: Citizenship by birth

Kenya is a party to the African Charter on the Rights and Welfare of the Child (ACRWC) and the UN Convention on the Rights of the Child. The ACRWC and the CRC both provide for every child to have the right to acquire a nationality. The ACRWC also provides that:

“States Parties to the present Charter shall undertake to ensure that their Constitutional legislation recognizes the principles according to which a child shall acquire the nationality of the State in the territory of which he [sic] has been born if, at the time of the child’s birth, he is not granted nationality by any other State in accordance with its laws.”¹

In line with this principle, Kenya’s 2001 Children Act already provides that: “Every child shall have a right to a name and nationality and where a child is deprived of his identity the Government shall provide appropriate assistance and protection, with a view to establishing his identity.”²

However, the 2010 Constitution fails to provide for children born in Kenya of stateless parents or who would otherwise be stateless to have citizenship by birth. The provision in Article 14(4) that a child less than eight years of age whose parents are not known is presumed to be a citizen by birth is welcome, but not a sufficient guarantee against statelessness. The circumstance where a child’s

¹ African Charter on the Rights and Welfare of the Child, Article 6. The 1961 UN Convention on the Reduction of Statelessness, which entered into force in 1975, also makes it a duty of states to prevent statelessness in nationality laws and practices. Article 1 mandates that “A Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless.” Kenya is not yet a party to this convention, but the African and UN child rights conventions endorse the same principles.

² Kenya Children Act (No. 8 of 2001), Section 11.



parents are not known is much rarer than that where the parents are stateless, or do not have the right or ability in practice to pass a nationality to their children. Although the lack of a provision in the Constitution on the grant of citizenship to stateless children is in violation of Kenya's obligations under the ACRWC, this omission can be corrected in the redrafting of the Citizenship Act.

- The new Citizenship Act should remedy the omission in the Constitution by providing that a person born in Kenya of stateless parents or who would otherwise be stateless shall be a citizen by birth.
- The legislation and regulations should also set out the means of demonstrating that a child is stateless; and the legislation should provide that, where an application has been made for recognition of citizenship on behalf of a child or adult born in Kenya who can show on a prima facie basis that he or she is stateless, it falls to the State to indicate which other nationality it believes the person has the right to if it wishes to deny the application. The State must be required to assist the person concerned (or his or her parents) to approach the authorities of that country, and the person concerned shall be required to cooperate with the State in these proceedings. A denial by the authorities of the other country that the person concerned is a national, or a failure to respond within a reasonable time, shall be conclusive.

Many countries in Africa provide that a child born on their territory of a parent also born there shall have the right to citizenship by birth; or (alternatively or in addition) that a child born on the territory who is resident there for a large proportion of his or her childhood and remains there at majority shall have the right to recognition of citizenship by birth at his or her majority. These provisions ensure that statelessness is not a multi-generational problem, and that marginalised populations are progressively integrated into the polity. They thus avoid the widespread exclusion from citizenship rights that has proved so divisive in countries such as Côte d'Ivoire or Democratic Republic of Congo. South Africa joined these countries in 2010, when it adopted amendments to its Citizenship Act that established these principles in national law.

The revised Kenyan Citizenship Act should do the same, and provide that:

- A person born in Kenya whose mother or father was also born in Kenya shall be a citizen by birth.
- A person born in Kenya who is still resident there at majority shall have the right, on application, to recognition of citizenship by birth.

The Act and regulations should also establish the means of obtaining recognition of citizenship by birth in these cases.

Finally it is important to point out that in a solemn Declaration by Heads of State who are signatories to the Great Lakes Pact, a regional treaty signed and ratified by Kenya, Kenya undertook to engage in "*a common regional approach for the ratification and implementation of the UN Conventions on Statelessness*" (Article 68, Dar es Salaam Declaration on Peace, Security and Development in the Great Lakes Region). We would urge therefore that the current opportunity to review Kenyan law relating to citizenship and the avoidance of stateless, be an occasion for Kenya to fulfil this undertaking.

- Kenya should ratify the 1961 UN Convention on the Reduction of Statelessness as well as the 1954 UN Convention relating to the Status of Stateless Persons.



Citizenship by registration / naturalisation

The previous provisions of the 1963 Constitution and Citizenship Act on acquisition of citizenship by registration or naturalisation should be substantially amended to bring the provisions in line with the 2010 Constitution and with Kenya's international obligations.

In particular, the provisions should no longer distinguish on grounds of ethnicity or national origin (the reference in the Citizenship Act to persons "of African descent" or in the Constitution to Commonwealth or African citizens).

The 2010 Constitution provides that a person may apply to be registered as a citizen on the basis of seven years' lawful residence, and such other conditions established by Parliament. Internationally, the term more usually used for acquisition of citizenship on the basis of residence is naturalisation, whereas registration is used for procedures where fewer conditions apply and therefore less discretion is in the hands of the executive (such as in the case of grant of nationality to spouses of citizens). We recommend that:

- Conditions additional to residence should be clearly and specifically provided and reasonably possible to fulfil. Grounds for exclusion from the right to naturalise should not include ill health or disability or general provisions relating to good character and morals, with the exception of criminal convictions for a serious offence.
- The age of majority, when an independent application for naturalisation can be made, should be 18 (rather than 21, as previously), in accordance with the Children's Act.
- A minor child of a person who naturalises as a citizen should acquire citizenship at the same time as the parent if he or she is living with that parent.
- If a person has been allegedly unlawfully resident in the country and has subsequently regularised their position, any period of allegedly unlawful residence preceding the recognition of lawful residence should be included in the calculation of the seven-year residence period to qualify for naturalisation.
- It is reasonable for persons whose residence on the territory is dependent on circumstances entitling them to diplomatic immunity to be excluded from these rights.
- In the case of spouses of citizens, the only condition to fulfil should be length of marriage, as established by the Constitution. Following registration as a national, the dissolution of a marriage between a national and a non-national should not in itself affect the nationality of either spouse or the capacity of the spouse that has registered as a national to transmit his or her nationality to their children.

See also below, under dual citizenship, in relation to conditions for acquiring Kenyan citizenship.

Refugees and stateless persons

Although the enactment in 2006 (after many years' delay) of the Refugee Act (No. 13 of 2006) did greatly improve the legal regime for refugees in Kenya, the Refugee Act does not provide for an explicit right for refugees to naturalise as Kenyans, and in practice, they are not enabled to do so, nor are their children granted nationality.³ Opinion polls indicate that almost half of all Kenyans support the right of children born in Kenya of refugees to be citizens by birth.⁴ Further, as a party to the UN

³ We regret the fact that the final version of the Constitution submitted to referendum did not recognise the right to seek and obtain asylum, included in the January 2010 draft.

⁴ 'Kenyans divided on citizenship for refugees', *Daily Nation*, 27 July 2008.



Convention Relating to the Status of Refugees 1951 and the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, Kenya has undertaken to “as far as possible facilitate the assimilation and naturalisation of refugees” (Article 34, UN Convention).

There are in addition other individuals who are not refugees but are stateless, who are permanently resident in Kenya and with significant or exclusive ties to Kenya and few if any ties to any other state, and yet are not recognised as citizens of Kenya.

- The new Citizenship Act and the Refugee Act should be drafted or amended (respectively) to provide explicitly for refugees to become Kenyan citizens and to facilitate the acquisition of nationality for stateless persons, after a period of residence that is no longer than the general period for acquiring citizenship by registration and ideally is less long.
- The children of recognised refugees born in the country should be citizens by birth.

Renunciation of citizenship

Article 18(d) of the Constitution provides for Parliament to enact legislation providing for voluntary renunciation of citizenship. The Citizenship Act should include provisions that:

- Citizenship may not be renounced if the person would thereby become stateless; and
- The State has no discretion to prevent a person from renouncing their citizenship, aside from establishing that the person will not become stateless.

Revocation of citizenship

The Constitution has restricted the previously very wide grounds on which citizenship could be withdrawn, and this is very welcome.

The Citizenship Act should establish principles of proportionality limiting the revocation of citizenship on grounds of fraud or false representation, especially in the case of those presumed to have acquired citizenship by birth, to situations where the fraud was serious and discovered within a fixed time period, and the harm done by revocation is not disproportionate to the seriousness of the fraud or misrepresentation alleged.

The Citizenship Act should provide that:

- Citizenship may not be revoked if a person would thereby become stateless.⁵
- In common with 31 other African countries⁶, Kenya should provide that citizenship by birth may not be revoked.
- Revocation of citizenship on grounds that it was acquired by fraud, false representation or concealment of a material fact should be disallowed where the harm caused to the person by the revocation of citizenship is disproportionate to the seriousness of the fraud alleged or the where the fraud occurred more than ten (for example) years previously.

⁵ In accordance with Article 8(1) of the UN Convention on the Reduction of Statelessness, which directs that “A Contracting State shall not deprive a person of his nationality if such deprivation would render him stateless.”

⁶ Ten of these countries do provide for loss of birth nationality on acquisition of another nationality, but not in any other circumstances.



Reacquisition of citizenship

The Constitution provides for a person who lost Kenyan citizenship because they acquired the citizenship of another country to be able to reacquire Kenyan citizenship, and the Citizenship Act and regulations should set out the basis for this to happen. In practice, steps must be taken to ensure that the right of those who acquired the nationality of another country when dual citizenship was not permitted to reacquire their Kenyan citizenship is respected for members of all ethnic groups without discrimination.

- The Constitution does not, however, provide for the reacquisition of citizenship by someone who has previously renounced it. The Citizenship Act should remedy this omission, and the Act and regulations should set out the modalities for doing so.

Due process protections

The current Kenya Citizenship Act explicitly excludes the right of any person to apply to court for the review of an administrative decision under the Act.⁷ This is a very serious violation of the right to fair administrative action established in Article 47 of the 2010 Constitution. In accordance with Article 47:

- The revised Citizenship Act should provide for reasons to be given for any decision taken under the act and for review of that decision by a court or independent and impartial tribunal. In particular, a decision to refuse recognition of citizenship by birth or to turn down an application for registration as a citizen should be subject to such review.
- The Act should provide for a court to certify nationality and order that relevant documents be issued in cases where an application for recognition of citizenship by birth or for naturalisation / registration as a citizen has not been processed within a reasonable time, or where the renewal of nationality or identity documents is refused or not processed within a reasonable time.
- The Act should provide for alternative systems of proof of identity and other requirements to obtain recognition of citizenship by birth or naturalisation / registration as a citizen in contexts where documentary evidence is not available or cannot reasonably be obtained, and for a court to have the power to order that the relevant documents be issued.

Decisions to take away a person's citizenship have such a drastic impact on his or her fundamental rights that this should be a judicial and not an administrative procedure. This is the case under the Citizenship Act of Ghana, for example.⁸

- The Citizenship Act should provide that a person's citizenship may not be revoked except by order of court on application by the State, and that it is for the State to prove all the elements required for citizenship to be taken away.

⁷ "The Minister shall not be required to assign any reason for the grant or refusal of any application under this Act and the decision of the Minister on any such application shall not be subject to appeal to or review in any court." Section 9 Kenya Citizenship Act, Cap 170.

⁸ Ghana Citizenship Act, 2000, Section 18: "The High Court may on an application by the Attorney-General for the purpose, deprive a person who is a citizen of Ghana, otherwise than by birth or adoption, of that citizenship on the ground (a) that the activities of that person are inimical to the security of the State or prejudicial to the public morality or the public interest; or (b) that the citizenship was acquired by fraud, misrepresentation or any other improper or irregular practice."



It should also be noted that in its signature and ratification of the Great Lakes Pact, Kenya has undertaken to play its part to ensure that there be a “mutually consistent legal and policy framework to respond to statelessness” including, in particular, the provision of “effective judicial remedies in the event of refusal or withdrawal of nationality” (see the Programme of Action of the Great Lakes Pact, an “integral” part of the Great Lakes Pact, Article 3 (1)).

Dual citizenship

We welcome the Constitution’s ending of the prohibition on dual or multiple citizenship. It is our interpretation of Article 15(4) that this applies equally to those wishing to become Kenyan citizens as to citizens by birth. The Citizenship Act should make this clear, where it sets out the requirements for registering as a citizen, by stating that

- A person who acquires Kenyan citizenship by registration / naturalisation shall not be required to renounce any other citizenship.

We find the restrictions in Article 78 of the Constitution on the holding of state office by dual citizens to be overly restrictive: in our submission on the draft Constitution, we recommended that any prohibition on the holding of state office or membership of the defence force by dual citizens should be restricted to the very highest offices. In any event, the Citizenship Act should provide that:

- The prohibition on dual citizenship for state offices and members of the defence forces should only apply from the time the person takes up the post, and not if he or she is merely an applicant or candidate for it.

Right to documents and birth registration

A very welcome provision of the 2010 Constitution is Article 12(1)(b) that “Every citizen is entitled to a Kenyan passport and to any document of registration and identification issued by the State to citizens.”

The right to a passport was already recognised by a 2007 court ruling that the right to travel does not have to depend on a prerogative, inference or any implied authority.⁹ The Citizenship Act and regulations should reflect this change, and make clear that there is no discretion in granting a passport to a person who has shown that he or she is a citizen. Moreover, the law should make the deliberate destruction or defacement of passports or other identification documents an offence. There are circumstances in which a passport may legitimately be confiscated by a public authority — for example, as a condition of bail for someone on trial for a criminal offence — and the Citizenship Act should establish a closed set of such circumstances, in compliance with Article 24 of the Constitution on the limitation of fundamental rights and freedoms.

The African Charter on the Rights and Welfare of the Child and the UN Convention on the Rights of the Child, to both of which Kenya is a party, establish that “Every child shall be registered immediately after birth”, and that this obligation shall be reflected in national constitutions (Article 6, ACRWC): unfortunately, however, this was not reflected in the 2010 Constitution.

It is government policy that every child should be registered at birth, and this is covered by the Births and Deaths Registration Act. In practice, however, only 40 per cent of Kenya’s infants are registered, and the 60 per cent not registered are disproportionately from certain population groups.

⁹ *Deepak Chamanlal Kamani v. Principal Immigration Officer and 2 Others* [2007] eKLR.



In 2007, the UN Committee on the Rights of the Child noted its concern at “the restrictive measures around birth registration, the discrimination with regard to the registration of children born out of wedlock and of non-Kenyan fathers, as well as the lack of mechanisms and infrastructure to facilitate birth registrations”.¹⁰ The KNHRC has also conducted several investigations and published reports indicating discrimination against certain population groups, including Somali and Nubian Kenyans, in the grant of birth registration and identity documents.¹¹

It should be noted also that the recently adopted Convention for the Protection and Assistance of Internally Displaced Persons in Africa requires states to take special measures, and remove unreasonable conditions, to ensure, *inter alia*, that internally displaced persons are “issued with relevant documents necessary for the enjoyment and exercise of their rights, such as passports, personal identification documents, civil certificates, birth certificates and marriage certificates” (Article 13 (3)).

The Kenyan State should strengthen the efforts already underway to ensure that universal birth registration is achieved, without discrimination, especially on the basis of ethnicity or place of birth. These measures should include, for example, the use of mobile birth registration units, registration free of charge and flexible systems of proof where it is not reasonable to meet the standard requirements. There is a need to modernise and computerise the registration systems.¹²

This is a submission by the Citizenship Rights Africa Initiative (CRAI). CRAI is a campaign by the Global Pan African Movement, the International Refugee Rights Initiative (IRRI) and the Open Society Foundations in Africa. The campaign aims at raising awareness of unequal access to, and arbitrary deprivation of, citizenship as a major human rights problem and one of the principle causes of displacement and unrest in Africa. This initiative seeks both to mobilise civil society and calls on governments to adopt policies that are more progressive.

¹⁰ Committee on the Rights of the Child, Concluding observations: Kenya, CRC/C/KEN/CO/2, 19 June 2007, para. 30.

¹¹ *An Identity Crisis? Study on the Issuance of National Identity Cards in Kenya*, Kenya National Human Rights Commission, 2007. The KNHRC is also working with UNHCR on another survey and report on the issue of statelessness, see <http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e483a16>. See also *The People’s Choice: The Report of the Constitution of Kenya Review Commission*, 2002.

¹² See the recommendations of PLAN International, available at <http://plan-international.org/birthregistration/resources/country-case-studies/kenya>, accessed 21 March 2011.